In The

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

No. 72-1248

MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI,

Petitioners,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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In The

Supreme Court of the United States

October Term, 1972

No. 72-

MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

Statement

Petitioners, MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI, jointly and severally, petition this Court to grant a Writ of Certiorari to review the order of the New York Supreme Court, Appellate Division, Second Department, dated November 6, 1972, which reversed a trial order of dismissal of the Westchester County Court and reinstated the indictment with a direction that it again proceed to trial.

An application for leave to appeal was made to the Court of Appeals of the State of New York, but the application for leave to appeal was dismissed on the 13th day of December, 1972, by Honorable John F. Scileppi, Associate Judge.

The indictment had charged the petitioners with attempted grand larceny in the second degree; falsifying business records in the first degree, and offering a false instrument for filing in the first degree.

Opinion Below

A memorandum decision of the Appellate Division reversing the dismissal of the charges against the petitioners is reproduced in the appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Judge John F. Scileppi of the Court of Appeals of the State of New York denied an application for leave to appeal to the Court of Appeals on the 13th of December, 1972.

Questions Presented

1. Whether petitioners were placed in double jeopardy by the order of the Appellate Division of the State of New York reinstating the indictment following its dismissal by the County Court

Judge after jeopardy had attached? (Fifth and Fourteenth Amendments, United States Constitution)

2. Whether the due process clause of the Fifth and Fourteenth Amendments are violated by compelling a defendant to stand trial where there is admittedly insufficient evidence to establish criminality as a matter of law?

3. Whether the rules of evidence as indicated by the reversal of the Appellate Division conform to the standards required by the Federal Constitution? (Chambers v. Mississippi, 71-5908, decided February 21, 1973, ___ U.S. ___)

4. Whether petitioners were deprived of the right of confrontation by the ruling of the Appellate Division that they were not entitled to determine what was actually said at a crucial meeting upon which the indictment was predicated?

Constitutional and Statutory Provisions Involved

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved, as well as Section 290.10 of the Criminal Procedure Law of the State of New York.

Statement of the Case

The issues herein are relatively simple since they involve the question of whether or not the Trial Court was correct in granting the trial order of dismissal pursuant to Section 290.10 of the

Criminal Procedure Law. As ancillary questions, the respondent is asking this Court to rule that the determination of the Trial Court that certain evidence was inadmissible was erroneous as a matter of law. These questions sought to elicit from the main witness of the prosecution, Harold Good, an employee of the New York State Commission of Investigation, certain conversations among employees of that Commission and the co-petitioner, SALVATORE MULTARI, on two occasions, June 5th and June 11th, 1969, when no hearing reporter was present and no transcript or memoranda of the questions and answers existed.

Good was completely unable to state what questions were propounded or by whom, and could not specifically recall what answers were given to which particular questions. The prosecutor at the trial was of the erroneous opinion that the questions by other employees propounded to the petitioner, Salvatore Multari, were inadmissible "hearsay" and that therefore only the best recollection of the answers were admissible. The Trial Court of course rejected that contention completely.

In addition, Good admitted that he did not recall whether or not the answers that he had some general recollection of, were in response to relevant questions because he frankly could not remember the questions or who asked them.

On another occasion, June 27, 1969, when a hearing reporter was present, and questions and answers were propounded to the petitioner, SAL-

VATORE MULTARI, the prosecution advised the Court that those questions and answers which were recorded were of no use to the case. Only those questions and answers which Mr. Good vaguely recalled, when no reporter was present, would be helpful, he said.

The Trial Court correctly rejected this sort of testimony since it is elementary that testimony consists of a question and an answer and neither the question nor the answer standing alone is testimony.

In its brief, the respondent argues that the statements allegedly made by petitioner, SALVATORE MULTARI, were in the nature of confessions or admissions. Here too, however, the respondent is incorrect since there is no evidence in the record as to what questions were asked so it is impossible to determine whether or not the answers, vaguely recalled by Mr. Good, were responsive to relevant questions.

It is not enough, however, that the prosecution wanted this rather vague testimony by Mr. Good to be received in evidence, but, in addition, sought to predicate the testimony of an accountant upon the questions and answers allegedly made by the co-petitioner SALVATORE MULTARI in order to infer possible criminality.

At the trial, the petitioner was unable to determine what questions were asked or answered because Mr. Good just did not recall. The Court therefore properly ruled that the testimony of Mr.

Good would have to be limited to the rules of evidence which, of course, require with some degree of specificity, that a witness recall what question was asked and what answer was made to that question. A general, rambling, narrative type of amorphous recollection cannot be a substitute for testimony at a trial. This is fortified by the fact that when the witness (co-petitioner SALVATORE MULTARI) appeared on June 27, 1969 before the Commission and a transcript was made of his testimony at that time, there was absolutely nothing of an incriminating nature revealed. It is therefore hard to believe that the offer of proof in the Court below as to what Mr. Good would try to recall, was submitted in good faith.

A few examples of Mr. Good's rather clumsy attempts to recall what was said, should suffice to demonstrate that the Trial Court was well justified in granting the motion since THE PEOPLE admitted they had no other evidence against the petitioners (158):

"Direct Examination (con'td) by Mr. Rende:

Q. Mr. Good, during the course of his appearance in the temporary Commission headquarters, was there any list of questions which Mr. Multari was to be asked before he appeared there? A. No, sir, there was not.

Q. And at this meeting was any specific member of the Commission entrusted with the duty of asking Mr. Multari various questions? A. No, sir.

Q. And besides Mr. Sohn, Mr. Alleyene, I think you mentioned, and perhaps Mr. Cutler, were there any other members of the Commission who were asking any questions? A. We were the only ones present, so we were the only ones who were asking the questions, Mr. Rende.

Q. Now, sir, do you recall specifically who it was that asked which question of Mr. Multari? A. No, sir, I do not.

Q. Do you recall yourself specifically asking Mr. Multari any particular question? A. Not any particular question, Mr. Rende.

Q. Well, do you recall asking him personally any questions? A. I did ask him questions, yes.

Q. Do you recall which questions or what area you questioned Mr. Multari about? A. No, sir, I have no recollection and no record of it. . . ."

The witness Good continued (159, 160):

"Q. Mr. Good, I am going to ask you to tell me and this Court if you specifically remember any particular question that you recall asking Mr. Multari, not necessarily word for word but in substance? A. That I personally asked him?

Q. Yes. A. I have no recollection of any particular questions that I asked him, Mr. Rende. . . .

Q. Do you have any record that might serve to refresh your memory? A. As to the specific questions and answers?

Q. As to what the statements given by Mr. Multari were and who asked them, who asked the questions? A. No, there is no record. There were no minutes taken, Mr. Rende, and there was no indication as to who proposed the questions throughout the interview we had. All we did was made a record of the results of our interview."

The colloquy with the Court indicated that the Court was not foreclosing the District Attorney from presenting a case if there was one to present but rather was requiring him to be more than precise in adhering to the rules of evidence. Thus, the following took place during the colloquy (161):

"Mr. Rende: I think the record ought to reflect, Your Honor, that we have had discussions, that is, the People and the defendant as well as the Court informally in chambers since the Court recessed this morning, and the issue which we faced when we recessed this morning was whether or not Mr. Good's recitation of Mr. Multari's statements before a meeting held at the temporary headquarters of the State Investigation Commission in June, whether Mr. Good's recitation of Mr. Multari's answers would be admissible since Mr. Good would not specifically recall who specifically asked which question that brought a particular answer from Mr. Multari.

The Court: I think it went a little farther than that, Mr. Rende.

Mr. Rende: Fine.

The Court: In the first instance, Mr. Good was testifying with respect to an appearance before himself, an accountant and two other representatives of the State Investigation Commission. It was his testimony there had been a conversation and that not only couldn't he recall which particular individuals asked which questions, it was indicated he couldn't recall the questions asked. We had a conference at the side of the bench that was the substance of the conference, that he also couldn't identify the questions; isn't that correct?

Mr. Rende: Yes."

At another juncture it was obvious that the District Attorney completely misunderstood the hearsay rule since he argued to the Court that questions asked of the defendant by any individual other than Mr. Good himself would be hearsay. The Court, of course, summarily rejected this argument (174, 175):

"Mr. Rende: This is my final point. Quite to the contrary of what I believe is the position of the Court, to require Mr. Good to recite what questions were asked by other people other than himself would clearly violate the hearsay rule. In that situation Mr. Good is being asked to relate what Mr. X, Mr. Y or Mr. Z asked the defendant. That is a clear violation of the rule.

The Court: I thought there was a clear

exception to the rule that conversations between the defendant and someone else overheard by a third party in the clear presence of both parties could be testified to by the third party. I thought that was one of the exceptions.

Mr. Lanna: As I understand it, yes, sir.

The Court: That's the way I understand it. That's a time when a witness can testify as to what he heard when he has heard both ends of the conversation in his presence.

Mr. Rende: Then I would again request some position by the Court on why Mr. Good's testimony couldn't be brought forward.

The Court: Mr. Good can testify with respect to any question he asked the defendant and any answers the defendant gave him. The Court ruled that before and before you commenced your last series of questions of Mr. Good on the witness stand, the Court had directed you to follow that line of questioning and you didn't do so, and I think you indicated that witness wasn't in a position to do it. The witness himself said it.

Mr. Lanna: My recollection is that he said he couldn't state what questions he asked.

The Court: That's my recollection."

In essence the ruling of the Court is contained in the colloquy at page 174:

"The Court: Well, the Court is not excluding this proof because of the contents of the proof, because as the proof would have evolved had it been admitted, would have depended upon ruling time and again during the course of the testimony. The Court has rejected the proof and, therefore, rejects the offer of proof on the grounds that this witness cannot testify with any clear recollection as to what exactly transpired at the hearings, at the meetings of June 5th and June 11th, in that he cannot testify with respect to conversations made in his presence, taken place in his presence with the defendant, because he can neither testify as to questions asked and responses given, nor can he identify the particular question and the particular response given to a particular question. The Court is concerned here with the witness being confronted by four inquisitors, and the Court is not using the word inquisitors to characterize representatives of the SIC, but to point out there were four people present, all of whom according to the witness were asking questions, and there is no clarity that the Court can foresee in the testimony as the Court has said before and is now being redundant is saying to identify the questioner nor the question. And it is conceivable that if four people are asking questions, that an answer could be given to a question not at the time being asked by one of the questioners, and, therefore, put the witness at a grave disadvantage in trying to recall the

context in which the questions were asked and the answers were given."

Lawrence Saltz, who was employed as a senior accountant in the Department of Public Works, had approved payment of the petitioners' bills and transmitted this approval to the Commissioner of Public Works for his approval. The claims which were submitted on March 14, 1969, and approved on June 18, 1969, were not paid (94, 96, 99).

It is thus clear that there was no evidence of criminality introduced during the trial.

Argument

Point I.

THE REVERSAL BY THE APPELLATE DIVISION ON THE LAW AND ON THE FACTS NECESSARILY PLACED THE PETITIONERS IN DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, SINCE THE NISI PRIUS COURT'S TRIAL ORDER OF DISMISSAL WAS NECESSARILY ON THE LAW AND NOT ON THE FACTS. THE APPELLATE DIVISION, BY REVERSING ON THE FACTS, IMPLIEDLY ADOPTED THE PROSECUTOR'S POINT OF VIEW THAT STATEMENTS UTTERED IN THE PRESENCE OF A DEFENDANT ARE INADMISSIBLE IN EVIDENCE. MOREOVER, THE APPELLATE DIVISION'S RULING PRECLUDES EFFECTIVE CROSS-EXAMINATION IN VIOLATION OF THE SIXTH AMENDMENT.

At the trial the petitioners were placed upon the horns of a dilemma since they were unable to determine what was said during an important meeting at which petitioner SALVATORE MULTARI was present.

The District Attorney admitted that the witness Harold Good, an employee of the New York State Commission of Investigation, was unable to recall what was said at this particular meeting, nor could he remember who said what to whom. Yet, he claimed to have some vague general recollection of a conclusory nature about which he wished to testify. The Trial Court quite properly refused to permit such evidence since it would be impossible to effectively cross-examine the witness. Additionally, the defense would be incapable of subpoenaing witnesses who may have been present but whose conversations were not recalled by Good (158-161).* (Chambers v. Mississippi, 71-5908, decided February 21, 1973, ___ U.S. ___).

The witness, Good, admitted that there had been no record nor transcript of the proceedings about which he was testifying which allegedly occurred during an investigation by the staff of the State Investigation Commission.

It is elementary that since the question and answer could not be recalled, the vague recollections were not evidence. Only a question followed by an answer where otherwise properly relevant and material, may be received in evidence.

* Numerals in parenthesis refer to the appendix in the Appellate Division of the Supreme Court, unless otherwise indicated.

A question alone and an answer alone are not evidence. (Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884; Lockwood v. Thorne, 18 N.Y. 285)

In Leach & Co. v. Pierson, 275 U.S. 120, 128, Justice Holmes declared in substance that evidence cannot be created by a question or statement in and of itself. It is the answer and the statement or question that constitutes the evidence.

The Trial Court in this case determined to grant a trial order of dismissal pursuant to 290.10 of the Criminal Procedure Law which declares, in part, that a trial judge may dismiss an indictment or any count thereof upon the ground that "the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense." This Court has held that the Government or prosecution may not secure a new trial by means of an appeal even though an acquittal or dismissal may appear to be erroneous. (Green v. United States, 355 U.S. 184, 2 L.Ed.2d 199, 204, 61 A.L.R.2d 1119. See also, Benton v. Maryland, 395 U.S. 784, and Ashe v. Swenson, 397 U.S. 436.)

At the very least, the prosecution would seem to be collaterally estopped from obtaining a reversal on the facts in this case and proceeding to trial again. (Harris v. Washington, 404 U.S. 55)

It is submitted, therefore, that based upon the evidence, there was no doubt whatsoever that the prosecution had no basis to proceed and that the

Trial Court was quite correct in dismissing the charges. The reversal by the Appellate Division necessarily indicates that the trial may proceed without affording the petitioners an opportunity to confront witnesses or to even know what the witnesses said.

Point II.

THE BASIC CRIMINAL LAW, AS WELL AS THE LAW OF THE STATE OF NEW YORK, REQUIRE THAT A "CORPUS DELECTI" FOR ANY CRIME BE ESTABLISHED. IN THE CASE AT BAR HOWEVER, THE EVIDENCE TOTALLY FAILS TO ESTABLISH THAT THE PROSECUTION PROVED THE EXISTENCE OF ANY CORPUS DELECTI.

In Chambers v. Mississippi, supra, this Court very recently established that it would not be foreclosed from considering evidentiary points if the application of a state rule of evidence deprived a litigant, in a state prosecution, of due process. This, however, is exactly what happened in the case at bar.

Section 60.50 of the Criminal Procedure Law declares that a person may not be convicted of any offense solely upon evidence of an admission made by him "without additional proof that the offense charged has been committed." People v. Roach, 215 N.Y. 592; People v. Taleisnik, 225 N.Y. 489; People v. Ulisano, 18 App. Div.2d 432; People v. Cassese, 281 App. Div. 890; and, People v. Edwards, 25 N.Y. Supp. 480.

In other words, the prosecution never had a corpus delecti of a crime. Supposedly, without the alleged conversations between certain persons and SALVATORE MULTARI, none of which were recorded, there would be no inkling of the possibility of any criminality.

Saltz, the accountant for the Public Works Commissioner, had approved payment so, apparently, everything was prima facie in order.

Good's testimony would still not have supplied evidence of criminality but the prosecution hoped that if Good were permitted to testify, that they then might produce an accountant who then might infer the possibility that services rendered by respondents were in excess of the amount of actual work performed. Everything, however; would depend upon the alleged admissions of SALVATORE MULTARI and not upon any independent evidence at all. Thus, under no circumstances was there a corpus delecti of this crime.

Conclusion

The Petition for Certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX

Order and Decision of the Appellate Division

On the 8th day of November, 1972, the Appellate Division of the Supreme Court, Second Department, unanimously reversed the order of the Trial Court which had granted a trial order of dismissal, and the Appellate Division reinstated the indictment with a direction to retry the case. The Decision (per curiam Decision) of the Court is as follows:

> "People &c., ap, v. Multari Equipment Corp. & Salvatore Multari, res— Appeal by the People from a trial order of dismissal, made Feb. 29, 1972, by the County Court, Westchester County, pursuant to CPL 290. 10, at the close of the People's case.
>
> Trial order of dismissal reversed, on the law and the facts, and new trial ordered.
>
> Defendants were indicted for grand larceny in the second degree, falsifying business records in the first degree and offering a false instrument for filing in the first degree. The basis for the charges was that defendants, retained by the City of Yonkers to aid it in snow removal operations in February of 1969, claimed payment for employing personnel to engage in such operations for a total of 3,308 hours, whereas the hours actually worked by such personnel were much less.
>
> At the trial, Good, an investigator for the State Investigation Commission, offered to testify that at an interview before him

and three other employees of the commission, defendant Salvatore Multari made certain possibly incriminating statements as to the equipment used and personnel employed by him with respect to such operations. However, the trial court refused to admit such proposed testimony since Good had admitted that he could not remember the exact questions that were asked of Multari and by whom they were asked, and the particular responses given thereto. No stenographic minutes were taken of the interview. In our opinion, the trial court erred in barring such testimony.

Testimony by a witness of an admission by a defendant should not be excluded because the witness does not remember the whole conversation or recall the exact words used (see 22A C.J.S., Criminal Law, sections 730, 735). Verbal precision in proving oral statements is not required. The substance or effect is sufficient (State v. Davis, 237 La. 577; Edwards v. State, 198 Md. 132; cf. McRorie v. Monroe, 203 N.Y. 426; People v. Colon, 281 App. Div. 354). That Good did not remember, inter alia, the questions asked, who propounded them, and the answers given, but allegedly remembered the substance of Salvatore Multari's answers, goes to the weight of the evidence, not to its admissibility."

Concurring: Samuel Rabin, P.J.; Latham, Shapiro, Christ and Brennan, JJ.

Decision Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

John F. Scileppi
Judge
(SEAL)

125-01 Queens Boulevard
Kew Gardens 15, New York

December 13, 1972

Irving Anolik, Esq.
225 Broadway
New York, New York 10007

Re: People v. Multari Equip. Corp.

Dear Mr. Anolik:

This is to advise you that your application for a certificate permitting an appeal to the Court of Appeals from an order of the Appellate Division, Second Department, dated November 6, 1972, which unanimously reversed a trial order of dismissal of the Westchester County Court, is dismissed.

The Appellate Division order recites that the decision of that court was on the law and the facts. We are, therefore, without jurisdiction to consider an appeal (Criminal Procedure Law, §450.90, subd. 2).

Very truly yours,

s/ John F. Scileppi

JFS:mek
cc: Clerk of Court of Appeals
Westchester County District Attorney

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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1248

MULTARI EQUIPMENT CORPORATION AND SALVATORE MULTARI,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-248

MULTARI EQUIPMENT CORPORATION AND SALVATORE MULTARI,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to captioned petition for a writ of certiorari.

Facts

At 1:00 a.m. February 9, 1969, a blizzard began, and by the time it ended two feet of snow had fallen on the City of Yonkers. The City did not have enough equipment to handle the emergency, so it hired independent contractors to assist. As a result of the claims made to the City by Multari Equipment Corporation and Salvatore Multari for work allegedly performed, both were indicted for the crimes of Attempted Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree and Offering a False Instrument for Filing in the First Degree.

Trial commenced February 24, 1972 before Honorable Timothy J. Sullivan and a jury. The People first called as witnesses four employees of the City of Yonkers who were involved in the snow removal crisis. Frank Salerno, Jr. was the snow coordinator and directed the removal of snow from February 9 to February 22 (R62-63). On February 10, 1969 private contractors, including the defendant, were contacted and immediately began work (R63, 65). Mr. Salerno did spot checks in the field and saw the defendant operating a loader as part of his assignment to clear the streets and plow the snow (R66, 67). There was no contract between the City and the private contractors prior to their employment, thus the contractors were to be paid at the green book rate based upon the tickets submitted at the end of the operation, which contained the equipment and the number of hours it worked (R641-65, 69-70). Mr. Salerno did not know how many pieces of equipment the defendant had on the street and, when the bills were submitted, assumed that the defendant, who had done prior work for the City, had submitted a correct claim (R68, 85, 80, 84).

Anthony Baiocco, an employee of the Department of Public Works, was assigned to check complaints against private contractors during the snow removal but, at that time, was not asked to check the defendant's equipment (R110-11). Sometime toward the spring he did inspect the defendant's equipment (R111) but was not permitted to testify to the result of that inspection (R112-118).

James Fay, a sanitation man, was assigned to spot check the equipment that was used by the defendant in the snow removal (R125-26). He didn't know one piece of equipment from another (R127), and didn't see any names on the equipment (R134) but, as he saw the defendant working a piece of machinery (R132) and the defendant stated he had the equipment he claimed (R133), Mr. Fay signed the tickets the defendant presented to him (R126, 129).

Lawrence Saltz was employed as a senior accountant in the Department of Public Works and as such was assigned to check the mathematical accuracy of the claims presented (R87). Letterhead invoices (exhibits 10-13, R89, 183-186 were received first and when the work tickets (exhibit 14, R90, 206) were received, the two were checked for mathematical accuracy (R90). (The discrepancies were cleared up in a telephone conversation with the defendant (R90-91)). Affidavit claim forms (exhibits 15-19, R97; 187-196) were then completed by the defendant and upon receipt by the City, Mr. Saltz checked them against the prior invoices and tickets for mathematical accuracy (R93). As everything appeared to be in order, the claims were submitted to the Commissioner of Public Works for approval (R93). The claims, which were submitted March 14, 1969 and approved June 18, 1969, were not paid (R96, 94, 99).

Harold Good, an employee of the New York State Commission of Investigation, was present on June 5, 1969 and June 11, 1969 when the defendant Salvatore Multari appeared before the Commission (R154-55). The defendant first appeared, pursuant to invitation, before Mr. Good, Albert Sohn, Richard Alleyene and Melvin Cutler at approximately 10:00 a.m., June 5, 1969 (R156-57). At that time the four men asked the defendant questions but, as there was no stenographer present, the questions were not taken down and the witness could not recall which of the four asked which specific question (R156-160). The witness was present at the proceedings and knew substantially what was asked (R157). The Court ruled, however, that the witness could not testify to what the defendant had stated to the members of the Commission unless he "could identify what particular person asked each particular question." (R161-62).

The People then made an offer of proof consisting of what the testimony of Mr. Good would have been and what the testimony of an accountant would have been, had he

been able to testify based upon the facts elicited from Mr. Good (R164-176). At the June 5, 1969 meeting, Mr. Multari described the equipment which he owned and that which he claimed he rented from outside subcontractors (R164). The defendant stated that he had no formal agreements with the subcontractors and that there had been no formal price (R165). At that time Mr. Multari could not name the men who operated the equipment, but when he returned on June 11, 1969, he named eleven people whom he claimed had worked for him during the snow removal (R165). Only two of those men had been paid by Multari (R165-66). Mr. Multari told the Commission that he had a list of the people who had worked for him and the total number of hours each had worked. He then stated that list plus the two men who had been paid, was a complete list of all the people who had worked for him (R166). That list (exhibit 29, R140, 197), prepared by the defendant, Salvatore Multari (R60-61), was submitted to the Commission on June 12, 1969 by Anthony Orriccio (R166). The total number of hours represented by the two men who had been paid and the names on the list, which the defendant claimed was complete, was 1,152 (R166).

Had the testimony that the list was complete been admitted, an accountant would have been called to give his analysis of the claim for 3,308 hours presented by the defendant (R167). The accountant would have given full credit to the defendant's statement to the Commission, that he and his partner worked steadily on the snow removal and that they worked twenty-four hours a day for thirteen days (R167). The accountant would then have testified that the claim exceeded the hours actually worked (R168).

Without the testimony of Mr. Good and the accountant, who could not testify without that basis, the People were forced to rest (R176). A trial order of dismissal pursuant to Section 290.10 of the Criminal Procedure Law was granted (R176).

The Appellate Division reversed that ruling finding that the testimony objected to was admissible and that the evidence presented coupled with that contained in the offer of proof would be sufficient to make out a legally sufficient case. The Court of Appeals denied review.

POINT I

The judgment of the State Court is not final within the meaning of 28 USC 1257.

The State appealed from the trial court's dismissal of the indictment on the sole ground that the court erroneously refused to allow the admission of certain testimony, thus preventing the State from proving a legally sufficient case. Neither the State nor the petitioner herein raised any issue as to the constitutionality of the right of the People to appeal or the Appellate Division to order a new trial as it related either to the issue of double jeopardy or the sufficiency of the testimony to permit cross examination. The Appellate Division, in reversing the trial court order of dismissal, reinstating the indictment and remanding for a new trial passed only on the issue of the admissibility of certain evidence and whether or not the evidence previously given, coupled with the evidence set forth in the People's offer of proof would be sufficient to make out a legally sufficient case (40 AD 2d 836, 337 NYS 2d 295).[1]

As the order of the Appellate Division reversing the order of the trial court and remanding the case for a new

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[1] There can be no question that the issue of double jeopardy can be litigated in the State courts even prior to a second trial by means of an Article 78 proceeding in the nature or prohibition, a collateral proceeding which would result in an appealable final judgment (7801, CPLR; *Kraemer* v. *County Court*, 6 NY 2d 363, 189 NYS 2d 878, 160 NE 2d 633). Of course, whether or not the defendant was prevented from cross examining a witness may only be determined from an examination of the testimony after trial.

trial is not final judgment, under 28 USC 1257 (*Gospel Army* v. *Los Angeles,* 331 US 543, 91 L.Ed. 1662, 67 S.Ct. 1428), this court should refuse to consider the issue, as any consideration thereof would be an intervention in a State Court proceeding in a manner in which the Federal Courts will not intervene (*Younger* v. *Harris,* 401 US 37, 27 L.Ed. 2d 669; 91 S.Ct. 746; *Samuels* v. *Mackell,* 401 US 66, 27 L.Ed. 2d 688, 91 S.Ct. 764; *Boyle* v. *Landry,* 401 US 77, 27 L.Ed. 696, 91 S.Ct. 758).

POINT II

An appeal by the State from a trial order of dismissal is constitutionally permissible.

At the end of the People's case, the defendant may either move for a trial order of dismissal, contending that the People have failed to prove a legally sufficient case or waive that right, present his defense and allow the case to proceed to verdict. If a trial order of dismissal is granted and the People are successful on appeal, i.e., the court finds that excluded evidence was improperly excluded and had it been admitted the People would have proven a legally sufficient case or if no evidence was improperly excluded that the People did in fact prove a legally sufficient case, the Appellate Division may reverse the trial court's order of dismissal and remand for a new trial. On remand the defendant stands in the same position as he was on the original trial, namely the People must prove his guilt beyond a reasonable doubt and he cannot be convicted unless the jury so finds. There can in no event be a summary reversal and a finding of guilt by the Appellate Division. Of course, if the People are not successful on their appeal from the trial order of dismissal, the order of the Appellate Division is as a matter of State law final, as no new trial can be had. If the defendant elects to proceed to a jury verdict and not move for a trial order of dismissal and is acquitted by that jury there can of course

be no appeal by the State. If the defendant is convicted and the evidence was sufficient to sustain the conviction, the court on appeal will affirm the conviction. If, however, the evidence was legally insufficient, the Appellate Division must dismiss.

If the evidence was legally insufficient the charges must be dismissed be it by trial order of dismissal or on appeal from judgment. If, however, the evidence presented was legally sufficient, the defendant's guilt or innocence must be determined by the jury be it on the original trial or on remand after a wrongful dismissal or the law by the trial court. The defendant's right to have his guilt proved beyond a reasonable doubt and such guilt or lack thereof determined by the jury is in either event preserved and in either event only once put before a jury for its consideration.

The effect of a motion by a defendant for a trial order of dismissal is the same as a motion for a mistrial. In either event, the defendant elects to arrest the trial, waiving a jury determination and any claim of double jeopardy on a new trial.

POINT III

The admissions made by the defendant to the State Investigations Commission were admissible and had they been admitted a legally sufficient case would have been proven.

It is elementary that any admission by the defendant is admissible against him in a criminal prosecution,[2] (*Wigmore on Evidence,* § 1050), and that "any act or declaration of the accused inconsistent with his innocence is admissible against him as an admission" (*Richardson on Evidence,* § 209), even if the admission was in the defend-

[2] We are not here concered with the "Miranda" or broader voluntariness issues.

ant's interest at the time it was made, so long as it was against his interest at the time of trial. (*Richardson on Evidence,* § 289; *Wigmore on Evidence,* § 1048). An oral admission or statement may be testified to by onyone who heard it (*McRorie* v. *Monroe,* 203 NY 426, 96 NE 724; *Gangi* v. *Fradus,* 227 NY 452, 125 NE 677; *People* v. *Miro,* 151 M. 164, 271 NYS 341).

We then come to the issue which was before the court in the instant case, may a witness, who was present when questions were asked and remembers the substance of the questions but not the exact questions or by whom they were asked, testify to admissions made by the defendant?

In *McRorie* v. *Monroe, supra,* the Court of Appeals had occasion to consider this precise issue. There a witness was called by the defendant to testify as to what he had heard the plaintiff say on a former trial. The witness first testified that he did not remember specific questions and then attempted to state what he had heard the plaintiff testify to. An objection to this testimony was sustained (Case and exceptions, 87-88). The Court in reversing the judgment stated, "The learned trial judge refused to allow the defendant to prove by this witness what he heard the plaintiff testify on the former trial; and exceptions were duly taken to his rulings in this respect. These rulings were plainly erroneous." Clearly a witness may testify to admissions made by the defendant even though he is unable to remember the questions.

The admissions of the defendant were admissible and the fact that the witness could not remember who asked the questions or the exact words used, went not to the admissibility of the admissions, but solely to the weight to be given to them (*Gangi* v. *Fradus, supra; Elliott on Evidence,* § 242). Thus, the trial court erred in holding that the statements were inadmissible.[3]

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[3]While not before the trial court for a ruling on admissibility, it might be appropriate to note that a memorandum of the results

(footnote continued on following page)

If Mr. Good had been allowed to testify, it would have been established by the defendant's admissions that other than the work performed by him and his partner, the total number of man hours that he supplied to the City was 1,152. The accountant would have testified that assuming the defendant and his partner worked 24 hours a day for the entire thirteen days (with appropriate overtime), the total number of hours accounted for was substantially less than those shown on the claim submitted by the defendant and therefore that he had attempted to overcharge the City. The accountant would have testified to the excessiveness of the claim based upon the price per hour and the excessive number of hours claimed. As the claim was approved by the City, but not paid, there would have been legally sufficient proof of the defendant's guilt of the crime of Attempted Grand Larceny in the Second Degree.

As the claim submitted to the City by the defendant justified the overcharge claimed, the proof would have been legally sufficient to prove the crime of Offering a False Instrument for Filing in the First Degree.

It was established on trial that the claim presented to the City and that reflected on the tickets maintained by the defendant as business records was the same. Therefore, the claim having been falsified, the business records were also falsified and there was legally sufficient evidence of the crime of Falsifying Business Records in the First Degree.

(footnote continued from preceding page)

of each interview was made (R159, exhibits 27 and 28, R176, 198-204). These detail memoranda made (and approved) by Mr. Good from notes taken by him at the time of the interview may well have been admissible, with a proper foundation, under 4518 CPLR. However, even if admissible, under the ruling of the trial court would not have been sufficient as they did not contain the exact questions asked or the identity of the person who asked any specific question.

The ruling of the court on a matter of State Law having been clearly erroneous and the evidence which would have been offered had the People not erroneously been prohibited therefrom, having been clearly enough to prove a legally sufficient case, the People were properly offered an opportunity to appeal from the interlocutory determination and upon reversal of that determination to present their case in toto to a jury (Compare: *Illinois* v. *Somerville*, —— US ——, —— L.Ed. ——, S.Ct. ——, 41 LW 4319).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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